At the End of the Law

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“It’s political economy, stupid!” There is probably no better way to express our increasing frustration caused by the avalanche of commentaries on the *Weiss* judgment by the German Constitutional Court published since May 5th. Predictably, journalists, pundits and esteemed colleagues alike have focused on the most spectacular aspects of the judgment: the open challenge to the primacy doctrine, “judicial dialogue” turned into sour antagonism, the prospect of the governments most prone to authoritarianism turning the *Weiss* doctrine to their own advantage or the announced launch of an infringement procedure by the European Commission. Even at this late stage in the game, we would like to warn against framing the debate on *Weiss* exclusively in terms of who has the ultimate authority or *Kompetenz-Kompetenz* (important as this issue is) in the European Union. The situation is too serious to be addressed with the unproductive categories of the past. The last thing we need is another discussion about constitutional pluralism, or for that matter, about which court is best, silently accepting the judicialisation of European politics that is as much a part of the cause as it is the cure of Europe’s maladies.

A more fruitful way to understand *Weiss* is to view it through the lens of political economy. From this perspective, neither court is on the money and neither court does or can offer a cure to the underlying problems in the Eurozone. On the contrary, they are both essentially offering different ways of maintaining or re-establishing a status quo that is untenable. What the conflict does indeed serve is to highlight the fundamental dysfunctionality of EMU as currently configured and the fact that muddling through is no longer a viable option. In the best case scenario it may focus minds on the fact that either a reform of the Treaties (and the domestic constitutions that underpin it) is required to create a genuine fiscal centre or to pursue a coordinated dismantling of monetary union with the formation of a looser structure.

Market logic, asymmetries and divisions

In order to explain why, we must first situate the judgment in its context, namely the protracted financial, economic and fiscal crises that Europe has experienced since 2007, now amplified by the Covid-19 pandemic. These massive challenges have found the European Union as a whole, and the Eurozone in particular, entangled in a set of institutional structures, decision-making procedures and substantive norms designed to solve (if at all) a very different set of problems from those facing Europe today. European economic governance was built on the belief that the stability of the euro as a currency could be ensured without the support of common supranational institutions, or what amounts to the same, that the euro could be the first modern money without a state. As a result, the design of the Eurozone lacks all the means and levers needed to stabilise an unhinged European economy. This constitutes a huge problem because the current double shock (to both supply and demand)

calls for massive public intervention aimed at strengthening public health care systems and protecting core productive capacities (first by means of “hibernating” the economy, then relaunching and – we would insist–deeply reforming it, when the worst of the health crisis is over).

It is true that Union institutions have “suspended” the application of competition and fiscal rules that pre-empt public intervention in the economy. Competition law rules precluding state aid have been virtually put on hold that even “temporary” *en masse* nationalisations are now possible. Fiscal rules setting ceilings on deficits and debts have been set aside for an indefinite period of time (here and here). As a result, states can (and indeed are strongly advised) to spend as if there was no tomorrow (or so we are told). Yet, how are these same states supposed to fund such expenditure?

In this crucial regard, there is much less of a break with the “Maastricht” rules of the game. In this understanding of “sound fiscal policy”, the revenue of states is not only to be conditioned by the political process (taxes) but also, and more critically, to be disciplined by the financial markets (debt). Consequently, states are prohibited from imposing compulsory loans (Article 124 TFUE) or from enjoying the benefit of central banks acting as purchasers and lenders of last resort (Article 123 TFUE). In other words, credit should only be enjoyed under “market conditions” (for the European Court of Justice, see *Pringle*, par. 135; *Gauweiler*, par. 114; for the German Constitutional Court, see for example *Weiss*, par. 201-2).

In present circumstances, this framework results in major defects, one which is very tangible in the short term, another which may materialise in the longer-term. To start with the short-term. When facing capital markets, EU member states display a remarkably unequal capacity to raise resources and, as a consequence, to service their debt. This is so for two related reasons. First, the impact of the crisis is and may remain deeply asymmetric (see also here). Worst hit are the countries with large tourism, transport and retail service sectors, and in which remote work is less feasible. Second, previous levels of debt lead to very different conditions of access to credit. As a result of these two factors, the simple unleashing of the financial power of states without taking note of the unevenness of such capacity runs the risk of accelerating divergences within the European Union, and especially within the Eurozone. And indeed, 52% of the total aid so far authorised has been granted to German companies. The European Commission has started to sound the alarm about the impact that this may have on the single market; fundamentally, it is European integration as a whole that is at stake. Then there is a second and more fundamental problem in the longer-term. If the crises were to last longer than analysts expect (a far from improbable scenario), all states, and not only those in the Eurozone periphery, may end up having serious problems in financing their public debt. To put it bluntly, would there be buyers if, in the middle of a deep recession revealing the fictitious character of large amounts of accumulated capital, all Member States wanted to place new debt to the value of 20% of their GDP in the market for the next two years, in addition to the amount that they would have to issue to roll over debt reaching maturity?

While there is in principle a strong case for centralised intervention to correct the asymmetries, the last months have seen the return of longstanding discussions between national governments on the most adequate instruments and future courses of action. An ongoing conflict has emerged between countries (mainly from Southern and Western Europe) supporting the idea of an EU fiscal response that would imply some degree of transnational solidarity and other countries (from Northern and Eastern Europe) accepting transfers only in the forms of loans assisted by conditionality measures (a repeat, thus, of the response to the fiscal crises of the 2010s). It is no mystery that both sides have their own agendas and see the Covid-19 crisis as a window of opportunity to push forward long-standing goals: the completion of Economic and Monetary Union (EMU) with supranational fiscal policies for the first group, the transformation of Southern economic and social models in the light of the neoliberal paradigm that has inspired the Union at least since the Maastricht Treaty (if not since the late seventies) for the second.

Enter the ECB and *Weiss*

European countries have so far managed to survive the latest crisis essentially because the European Central Bank established a provisional safety-net at the beginning of the pandemic, acting at the very limits of its powers (and, most probably, beyond them). After some initial hesitations, the ECB not only expanded its second round of quantitative easing by more than 300 billion euros, but also adopted the so-called *Pandemic Emergency Purchase Programme (PEPP),* an extraordinary plan worth 750 billion euros that has bought enough time to ensure that the struggling national economies and EMU as a whole live to see another day. PEEP is very bold by European standards: unlike the initial quantitative easingprogrammes, it departs from the principle that acquisitions have to be undertaken in proportion to the “capital key” of each Member State, that is, by the percentage in which they participate in the capital of the ECB. Consequently, no limit is established on the relative weight of bonds purchased from a single state.

However, compared with the programmes adopted by other central banks (here and (here), PEPP remains limited and doesn’t even raise the prospect of direct monetary financing (in theory, the ECB could sell the bonds acquired at the time of its choosing). The ghost of “sound public finance” undoubtedly still haunts the Eurozone. As such, it haunts the *Weiss* saga, just as it did the *Gauweiler* saga before it.

The same principle of “sound public finance” underlies whatever methodological differences exist between Karlsruhe and Luxembourg. Their confrontation on the division or proportional exercise of competences reflects differences in opinion about how the ECB should be checked so as to respect this principle. From a political economy perspective, the reasoning of the two courts largely overlaps by concealing the fundamental dysfunctionality at the heart of EMU.

Justification: not just a matter of detail

Since its Maastricht ruling, Karlsruhe has assumed a clear and fast line in the European economic constitution between monetary policy on the one hand and fiscal policy on the other. At stake is the preservation of the *Bundestag's* fiscal autonomy, which may be eroded through a lax interpretation of monetary policy by an institution that lacks democratic legitimacy. These arguments are not without weight. Unfortunately, as federal practice shows, delimiting the spheres of power by reference to a rigid determination of competences may simply be impossible. As advocate general Cruz Villalón already stated in his conclusions in *Gauweiler*, there is no easy way of drawing the line between fiscal and monetary policy, because monetary policy cannot but be part of general economic policy (par. 129 Conclusions in *Gauweiler*). We add that drawing one clear line between the two policies does not result in clarity, but rather in ideological obfuscation of the underlying problems, and of the incompatibility of the current economic constitution with democratic and social commitments across the Eurozone.

The Court of Justice reinstated the distinction, minimising the "indirect effects" on economic policy and protecting PSPP by asserting its proportionality in relation to its monetary policy objectives. This is what triggered a bold response from the GCC, which came close to characterising the Court of Justice's proportionality review as a sham. The Luxembourg Court had utilised proportionality to perform a limited review, deferring to the technical authority of the ECB ("nothing more can be required" than a careful and accurate use of its expertise). Karlsruhe denounced the lack of any due identification and balancing of the opposing interests – without including economic policy effects in the balance, proportionality is nothing short of an outright empowerment of the ECB, enabling it to "decide on its own competence". The different approaches of the two Courts on proportionality along with the fundamental question of how far a court should restrict the discretion of an independent institution by engaging in strict judicial review will keep public lawyers busy for a long time to come.

These are not small matters. But they are, in important ways, irrelevant. *Any* 'correct' answer to questions of legal methodology in conducting proportionality review in the current legal framework will have very little bearing on the question of how to fashion democratically and effectively programmes of intervention. The legal arguments of the Court of Justice protected the heavy architecture of EMU that emerged from the sovereign debt crisis, of which – by choice of the Union's political institutions – the transformation of the ECB's role since 2012 is a central piece. The GCC highlighted the weaknesses and limits of those arguments. In doing so, it also revealed the democratic and legal defects of that same architecture (if more arguments were needed…). Yes, the judicial dispute illustrates important differences in position on the application of proportionality, whether it should be used as a tool of empowerment or of constraint. There is much to be said and to criticize about both positions and both judgments. Yet a simple modification of the reasoning of the ECB that would come close to complying with the proportionally strictures dictated by the GCC will not calm the waters or lead to a continuation of business as usual. How can the ECB provide a justification of PSPP, accounting for its monetary, economic

and social effects – a justification to enable proper parliamentary control of its programmes – without admitting that doing “whatever it takes” means doing what the Treaty currently prohibits? Without showing that maintaining “sound public finance” is a contortionist trick that is performed at the expense of democratic choices?

Muddle through, reform or unravel?

So, what are the concrete implications of the *Weiss* judgment when viewed from the standpoint of political economy? The judgment not only establishes stringent constraints on the capacity of the ECB to pursue monetary policy in the way that it recently has. It also threatens the future PEPP programme. It may not have killed it, and, by the time it reaches the Court (by the same parties challenging the PSPP), PEPP may have already done its job. What it does threaten is the very concept of the PEPP and, more broadly, any prospect of using monetary policy in creative ways to compensate for the Union’s lack of robust fiscal policy instruments. In other words, the GCC’s gamble keeps alive the bid to limit the EU’s powers and to limit other state’s fiscal room for manoeuvre, precisely at a time that the coronavirus crisis wrecks the regulatory ideal of “sound public finance”.

There is, however, a silver lining. Even the harshest critics of the timing, logic and tone of the German Constitutional Court’s ruling have to acknowledge that it forces the European Union to face some fundamental and perhaps existential issues.

To be sure, the most likely scenario is that the EU will come up with the umpteenth fudge to muddle through, the most obvious possibility being the adoption of macroeconomic adjustment programmes in Southern European countries backed by the ECB’s OMT programme. In this respect, the *Weiss* judgment reveals a high degree of political awareness on the side of German constitutional judges because it strengthens the minority position of the Bundesbank within the Governing Council of the ECB and favours the preferred outcome of Northern and Eastern European countries since the beginning of the crisis. But if that is the outcome, the chances of an uncoordinated implosion of the Eurozone would dramatically increase, as any measure of fresh austerity imposed upon peripheral States will be literally explosive.

And yet the ongoing crisis and the *Weiss* judgment may also open a window to reconsider EMU. Even if the GCC had not intervened, it remains the case that central banks can only buy time, and that there are limits to the effectiveness of monetisation (resulting from the unavoidable link between money and the productive capacity of an economy). From that perspective, the *Weiss* judgment represents a major opportunity and, perhaps, a moment of truth.

We have reached a point at which the status quo and muddling through have become untenable. The serious options available to the Eurozone have shrunk to two: reform or dismantle. Either to reshape EMU in the form of a sustainable and fair economic and monetary union or else put all efforts into organising the coordinated dismantling of monetary union and formation of a looser structure. In both cases, a *rupture* is called for.

A genuine economic and monetary union requires establishing both a "fiscal centre" with fiscal capacity to meet the challenge of solidaristic reconstruction and transformation of the economy, and a central bank capable of acting as buyer and lender of last resort, under the supervision of the European Parliament and the Council. A looser monetary infrastructure involves a successful, hopefully happy divorce, undertaken in such a way that solidarity can be reinforced rather than undermined in its aftermath. In both cases, it would be necessary to break the taboo of EU Treaty revision, and probably also domestic constitutional change, not least to the German Basic Law.

The merits of the *Weiss* judgment could be precisely to open up this kind of debate about European integration in Germany and elsewhere in Europe. Past experience has taught us that the idea of a stability community as designed in the Treaties works only at the expense of the democratic and social constitution (here, here and here). Past and present experience also shows the necessity of using macroeconomic instruments that are part of the social democratic tradition and which EU rules constrain. If those are now required again, there are only two ways to harness them: either by aligning EMU to democratic and social ends or unravelling EMU to restore democratic and social constitutionalism at the national level. *Tertium non datur. Se non ora, quando?*
